Bintang-Bintang Sdn Bhd v The Ayer Molek Rubber Co Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–1279–06 OF 2012
APANDI ALI, LINTON ALBERT AND HAMID SULTAN JJCA
22 MARCH 2013

Civil Procedure — Appeal — Appeal against judgment of High Court — Sale and purchase of land — Declaration — Whether transfer of land void ab ibnitio — Whether any disposition of property after commencement of winding up void and nullity — Whether could be saved by court

In the present appeal, the appellant/the first defendant sought to set aside a part of the order by the High Court. The respondent/the plaintiff sought a declaration that the transfer of its land to the appellant was void ab initio in consequence of winding up proceedings. Briefly the facts were that the respondent sold a parcel of land to the first appellant and the sale price was fully-paid and the land was transferred. The new directors of the respondent had brought the action against the first, second to fifth defendants who were previous directors in the sale and transfer. The sixth defendant was the agent appointed by the respondent to dispose of the said land while the seventh defendant was the solicitor acting for the appellant in respect of the sale. The appellant alleged that the respondent's directors had acted in breach of their fiduciary duties, fraudulently and dishonestly conspired with the appellant; fraud on the part of the appellant in wrongfully, dishonestly and fraudulently conspiring with the second, third and fourth defendants to cheat and defraud the respondent; the sale of the said land was at an undervalued price; there was no valid board of directors' resolution of the respondent approving the sale and transfer of the land to the appellant. A winding up order was made against the respondent which was stayed until the disposal of the appeal. This was followed by a permanent stay of the winding up order. The learned trial judge allowed the claim against the first defendant but dismissed claims against the second, third, fourth and sixth defendants. Hence, the present appeal. The issue that arose in the present appeal was whether any disposition of the property after the commencement of winding up was void and a nullity or could be saved by the court.

Held, allowing the appeal with costs of RM50,000:

(1) Any disposal of property after the commencement of the proceeding could be validated by the court before or after the winding up order. It was also well-settled that an order for validation under s 223 of the Companies Act 1965 ('CA') would ordinarily be given if the transaction

was made reasonably and in good faith for the benefit of the company or made honestly and in the ordinary course of business (see para 20(a)).

(2) If the appellant had made an application for validation, in all likelihood would be given as it was the finding of the court that the transaction in essence was bona fide. Even if the appellant, by way of counterclaim, had sought an order for validation in all likelihood it would be given, as a declaratory order was only a discretionary relief and based on the jurisprudence relating to discretion under the Specific Relief Act 1950, the court on the factual matrix case ought not to have granted the order in favour of the respondent, more so when the transaction was bona fide and the title had been perfected (see para 20(b)).

(3) From the reading of s 223, it was clear that the status of the disposal could only be determined by the court. In practical terms, even though the Act stated that it was void, it was not void ab initio or nullity or illegal per se. The commercial reality was that there may be a number of transactions which would have escaped the court's scrutiny during the twilight period of commencement and winding up which if challenged in court might be declared void. If not challenged it might pass as an ordinary transaction of the company. In consequence to say such a transaction was a nullity and could not be cured and accepted by the learned judge was flawed. More so when the learned judge found that the transaction in essence was bona fide and title had been perfected (see para 20(c)).

(4) The learned judge had omitted to deal with the first stay order and in consequence the integrity of the decision making process had been compromised on this issue and appellate intervention was necessary. Save for this issue, the judgment was sound in all aspect (see para 20(g)).

[Bahasa Malaysia summary

Dalam rayuan ini, perayu/defendan pertama memohon untuk mengetepikan sebahagian daripada perintah Mahkamah Tinggi. Responden/plaintif memohon deklarasi bahawa pindah milik tanah kepada perayu adalah tidak sah ab initio berbangkit daripada prosiding penggulungan. Secara ringkasnya, fakta-fakta adalah bahawa responden telah menjual sebidang tanah kepada perayu pertama dan harga jualan telah dibayar sepenuhnya dan tanah tersebut kemudiannya dipindahmilik. Pengarah-pengarah baru responden telah membawa tindakan terhadap defendan-defendan pertama, kedua hingga kelima, yang merupakan pengarah-pengarah yang sebelum ini terlibat dalam penjualan dan pindah milik. Defendan keenam merupakan ejen yang dilantik oleh responden untuk melupuskan tanah tersebut manakala defendan ketujuh adalah peguamcara yang bertindak bagi pihak perayu bagi penjualan. Perayu mendakwa bahawa pengarah-pengarah responden telah bertindak melanggar tugas fidusiari mereka, menipu dan secara tidak jujurnya telah berpakat dengan perayu; penipuan di pihak perayu secara tidak sah, tidak jujur dan secara fraud

berpakat dengan defendan-defendan kedua, ketiga dan keempat untuk menipu responden; penjualan tanah tersebut adalah pada harga yang terlalu rendah; tiada resolusi lembaga pengarah-pengarah yang sah responden yang telah meluluskan penjualan dan pindah milik tanah kepada perayu. Suatu perintah penggulungan telah dibuat terhadap responden yang mana telah ditangguhkan sehingga pelupusan rayuan. Ini diikuti tangguhan perintah penggulungan yang kekal. Hakim bicara telah membenarkan tuntutan terhadap defendan pertama tetapi menolak tuntutan terhadap defendan-defendan kedua, ketiga, keempat dan keenam. Oleh itu, rayuan ini. Isu yang timbul dalam rayuan ini ialah sama ada apa-apa pelupusan harta selepas bermulanya penggulungan adalah tidak sah dan terbatal atau boleh diselamatkan oleh mahkamah.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM50,000:

(1) Apa-apa pelupusan harta selepas bermulanya prosiding boleh disahkan oleh mahkamah sebelum atau selepas perintah penggulungan. Adalah juga matan bahawa suatu perintah untuk pengesahan di bawah s 223 Akta Syarikat 1965 ('AS') akan kebiasannya diberikan jika transaksi itu telah dibuat secara munasabah dan dengan suci hati untuk kepentingan syarikat atau dibuat dengan jujur dan perjalanan perniagaan biasa (lihat perenggan 20(a)).

(2) Jika perayu telah membuat permohonan untuk pengesahan, adalah dalam semua kemungkinan akan diberikan kerana menjadi dapatan mahkamah bahawa transaksi pada asasnya adalah bona fide. Walaupun perayu, melalui tuntutan balas, memohon perintah untuk pengesahan dalam semua kemungkinan ia akan diberikan, oleh kerana suatu perintah pengisytiharan merupakan relief budi bicara dan berdasarkan perundangan yang berkaitan dengan budi bicara di bawah Akta Relief Spesifik 1950, mahkamah berdasarkan fakta matrik kes tidak sepatutnya memberi perintah yang memihak kepada responden, lebih-lebih lagi apabila transaksi tersebut bona fide dan hakmilik telah disempurnakan (lihat perenggan 20(b)).

(3) Berdasarkan bacaan s 223, adalah jelas bahawa status pelupusan hanya boleh diputuskan oleh mahkamah. Dari segi praktikal, walaupun Akta menyatakan bahawa ia adalah tidak sah, ia bukanlah tidak sah ab initio atau suatu pembatalan atau menyalahi undang-undang per se. Realiti komersial adalah bahawa mungkin terdapat beberapa transaksi yang akan terlepas daripada penelitian mahkamah dalam tempoh akhir permulaan dan penggulungan yang jika dicabar di mahkamah mungkin akan diisytiharkan tidak sah. Jika tidak dicabar, ia mungkin lulus sebagai perjalanan biasa syarikat. Akibatnya, untuk mengatakan apa-apa urus niaga adalah terbatal dan tidak boleh diperbetulkan dan diterima oleh hakim adalah cacat. Lebih-lebih lagi apabila seorang hakim mendapati

bahawa transaksi pada asasnya adalah bona fide dan hak milik telah disempurnakan (lihat perenggan 20(c)).

(4) Hakim telah melakukan tinggalan untuk menangani perintah penggantungan pertama dan akibatnya, integriti proses membuat keputusan telah dikompromi mengenai isu ini dan campur tangan rayuan adalah wajar. Melainkan isu ini, penghakiman adalah sempurna dalam semua aspek (lihat perenggan 20(g)).]

Notes

For cases on appeal against judgment of High Court, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 800–803.

Cases referred to

Alghussein Establishment v Eton College [1991] 1 All ER 267, HL (refd)
Alliance Bank Malaysia Bhd v W Shalihudin bin W Ibrahim and another suit [2012] 10 MLJ 374, HC (refd)
Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid [1979] 2 MLJ 244, FC (refd)
Clifton Place Garage Ltd, Re [1969] 3 All ER 892, Ch D (refd)
Jardio Holdings PTY Ltd v Dorcon Construction PTY Ltd [1984] 3 FCR 311, FC (refd)
Krextile Holdings Pty Ltd v Widdows Re Brush Fabrics Proprietary Limited [1974] VR 689, SC (refd)
New Zealand Shipping Company Limited v Societes Des Ateliers Et Chantiers De France [1919] AC 1, HL (refd)
Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd [1999] 3 MLJ 489; [1999] 3 CLJ 577, CA (refd)
Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee) [1998] 4 MLJ 651; [1998] 4 CLJ 812, CA (refd)
Steane's (Bournemouth) Ltd, Re [1950] 1 All ER 21, Ch D (refd)
Tiong Hung Ming v Kalimantan Hardwood Sdn Bhd; Weeluk Holding Sdn Bhd (Applicants) [2008] MLJU 381; [2008] 9 CLJ 593, HC (refd)
Tradebond (M) Sdn Bhd v Halim-O Construction Sdn Bhd [2005] 7 MLJ 624; [2005] 7 CLJ 93, HC (refd)

Legislation referred to

Companies Act 1965 ss 223, 236, 243
National Land Code s 340(1)
Specific Relief Act 1950

Appeal from: Suit No MT2–22–217 of 2009 (High Court, Johor Bahru)

M Pathmanathan (Shanti Pathmanathan and Shirin Pathmanathan with him) (M Pathmanathan & Co) for the appellant.
SK Sivam (Izzat Othman with him) (PG Lim & Co) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] This is our judgment in respect of the appellant/first defendant's appeal to set aside a part of the order of the High Court only, which came for hearing on 25 February 2013 and on the same day we allowed the appeal. My learned brothers Mohamed Apandi bin Hj Ali JCA and Linton Albert JCA have read the draft judgment and approved the same. This is our judgment.

[2] The respondent/plaintiff's claim in essence was to seek a declaration that the transfer of its land to the appellant is void ab initio in consequence of winding up proceedings.

[3] One of the crucial section to determine in this appeal is s 223 of the Companies Act 1965 ('CA 1965') and the scope of s 243 of the CA 1965. The said sections read as follows:

> Section 223: Avoidance of dispositions of property, etc.
>
> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.
>
> Section 243: Power to stay winding up.
>
> (1) At any time after an order for winding up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.

[4] At the outset we must say that s 243 of the CA 1965 itself does not prohibit the court while granting the stay to make any relevant orders which may be necessary and essential under s 223 of the CA 1965. And no authorities from respected jurisdiction were furnished to say otherwise. In addition on the factual matrix of the case s 223 will not apply.

[5] At the commencement of the appeal, we posed a question to both learned counsel whether any disposition of the property after the commencement of winding up is void and a nullity or can be saved by the court. Both counsels agree the court has the final say. It must not be forgotten that all illegal agreements are void and court will not condone illegal agreements. However,

all void agreements are not necessarily illegal.

BRIEF FACTS

[6] The respondent sold a parcel of land to the first appellant. The sale price has been fully paid and the land transferred. The new directors of the respondent had brought the action against the first defendant as well as the second to fifth defendants who were previous directors at the time of the sale and transfer. The sixth defendant was the agent appointed by the respondent to dispose of the said land. And the seventh defendant is the solicitor acting for the appellant in respect of the sale.

[7] The learned trial judge upon hearing the parties made the following orders:

(a) the claim against the fourth defendant is dismissed with costs of RM10,000;

(b) the claim against the fifth defendant is dismissed with costs of RM10,000;

(c) the claim against the second, third and sixth defendants is dismissed with no order as to costs;

(d) the claim against the seventh defendant is dismissed with costs of RM12,000;

(e) the claim against the first defendant is allowed on the following terms:

(i) a declaration that the land was unlawfully transferred to the first defendant and the transfer is invalid and of no effect,

(ii) order directing the Registrar/Land Administrator, Johor to cancel the MOT and to replace the name of the plaintiff as the proprietor of the land;

(iii) order that subject to item (f) below, the first defendant forthwith take all steps necessary to transfer the land to the plaintiff;

(iv) an injunction to restrain the first defendant or their agents or servants from dealing with the land by way of transfer or in any manner whatsoever;

(v) damages to be assessed by the deputy registrar;

(vi) liberty to apply; and

(vii) costs of RM30,000,

(f) in respect of the first defendant's counterclaim:

(a) the plaintiff refund to the first defendant the purchase price of RM12,087,000; and

(b) the plaintiff reimburse the first defendant for the value of the improvement and infrastructure, if any, made to the land, such amount to be assessed by the deputy registrar.

[8] The respondent/plaintiff's claim in the High Court has been summarised by learned counsel for the appellant as follows:

(a) the respondent's directors had acted in breach of their fiduciary duties, fraudulently and dishonestly conspired with the appellant;

(b) fraud on the part of the appellant in wrongfully, dishonestly and fraudulently conspiring with the second, third and fourth defendants to cheat and defraud the respondent;

(c) the sale of the said land was at an undervalued price;

(d) there was no valid board of directors' resolution of the respondent approving the sale and transfer of the land to the appellant;

(e) the sale was not approved by the general meeting of the respondent;

(f) the respondent ought to have known that the sixth defendant was not a registered estate agent;

(g) fraud on the part of the seventh defendant; and

(h) a winding up order was made against the respondent on 13 April 2006 which was stayed on 17 May 2006 until the disposal of the appeal on 21 September 2007. On 8 August 2008 there was a permanent stay of the winding up order.

[9] There were two stay orders pursuant to s 243 of the CA 1965. The first stay order was granted on 17 May 2006 pending appeal to the Court of Appeal against the winding up order. The appeal was dismissed on 21 September 2007 and in consequence the stay lapsed. The second stay order was secured with the knowledge of relevant parties on 8 August 2008.

[10] It must be noted here that the stay order dated 17 May 2006 does not state that the company is prohibited from disposing of the said land until the disposal of the appeal. In fact all relevant parties were aware of the disposal or proposed disposal which had commenced as early as May 2005. In addition there is no prohibition in law more so under s 223 of the CA 1965 to include such a term when a stay under s 243 of the CA 1965 is made. In this case that was not done but the solicitors for the respondent attempts to distinguish the

stay under s 243 pending appeal as a temporary stay and in consequence argues there cannot be a disposal during that period, but did not furnish any authority on point. We will deal with this issue later in the judgment.

[11] The respondent's prayer in the amended statement of claim reads as follows:

(a) an order that the private caveat Presentation No 12979/2009 filed by the Plaintiff on the 711 acres of land held under Grand for Land 92575, Lot 2203 Mukim Buloh Kasap, District of Segamat, State of Johor remain on the register until the final disposal of this suit;

(b) a declaration that the Sale & Purchase Agreement dated 12.4.2006 between the Plaintiff Company and the 1st Defendant is void ab-initio and be set aside;

(c) a declaration that the lands belonging to the Plaintiff i.e. agricultural land planted with oil palm measuring 711 acres under Grand for land 92575 Lot 2203 Mukim Buloh Kasap, District of Segamat, State of Johor was unlawfully and fraudulently transferred to the 1st Defendant and said transfer is invalid and is of no effect;

(d) a declaration that the Memorandum of Transfer in respect of the said land held under Grant for Land 92575, Lot 2203 Mukim Buloh Kasap, District of Segamat, State of Johor executed by the 2nd and 3rd Defendants in favour of the 1st Defendant and registered in the Register of Titles on 27.6.2006 was fraudulent, null and void and is of no effect;

(e) An order directing the Registrar/Land Administrator, Johor to cancel the Memorandum of Transfer and to replace the name of the Plaintiff as the proprietor of the land held under Grant of Land 92575, Lot 2203 Mukim of Buloh Kasap, District of Segamat, State of Johor;

(f) An order that the 1st Defendant forthwith take all steps necessary to transfer the 711 acres of land held under Grant for Land 92575, Lot 2203, Mukim of Buloh Kasap, District of Segamat, State of Johor to the Plaintiff Company;

(g) An injunction to restrain the 1st Defendant or their agents and/or servants from dealing with the said land held under Grant for Land 92575, Lot 2203 Mukim of Buloh Kasap, District of Segamat, State of Johor by way of transfer or in any manner whatsoever;

(h) An order that the 6th Defendant refund the Plaintiff the sum of RM362,610.00 commission paid by the Plaintiff Company with interest thereon at 8% per annum from 22.4.2006 to date of payment;

(i) An order that the 6th Defendant refund/repay Plaintiff the sums of RM40,000.00 paid on 5.6.2006 and RM150,000.00 paid on 27.7.2007 with interest on the said sums at 8% per annum from 6.6.2006 and 28.7.2006 respectively;

(j) In the interim an order that an independent Estate Management

Contractor (EMC) be appointed to manage the estates on the said land until the final disposal of this suit and said EMC to render accounts to the Plaintiff/1st Defendant during such period;

(k) Damages;

(l) Costs;

(m) The Plaintiff may have liberty to apply;

(n) Such further or other orders that this Honourable Court may deem fit.

[12] There were two principal issues for the determination of the trial court. It can be summarised as follows:

(a) whether the sale was effected by the fraud, dishonesty and conspiracy of the defendants; and

(b) whether the sale was valid when it was effected during the period after the presentation of winding up petition and after a winding up order has been made.

[13] The learned judge at p 28 of his judgment had stated that the first issue is a question of fact and the second issue is a question of law (see p 47). We are in total agreement and in fact there is no appeal in respect of the first issue and the appeal is only in respect of the second issue. On the first issue the finding of the learned judge, inter alia, reads as follows:

> On the totality of the evidence adduced at trial, the court is not satisfied that there is any evidence upon which to infer an intent of fraud or conspiracy on the part of the first–seventh defendants. There is no evidence of any agreement between the defendants to carry out the alleged fraud. Whilst their actions may not have been lawful, there is no element of fraud. Further, there is no evidence to show that the plaintiff suffered any loss. The purchase price for the land was not unusual in the circumstances as it is consistent with the value assessed by the Government Valuation Department. In addition, the purchase price had already been paid for in full. In the premises, the charge of fraud and conspiracy has not been made out beyond reasonable doubt. By reason of the foregoing, the question is answered in favour of the defendants.

[14] In consequence the learned judge had dismissed the claim against the second to seventh defendants and had held that under s 340(1) of the National Land Code, the appellant's title is indefeasible and free from all adverse claims or encumbrances.

[15] On the second issue, the learned judge, inter alia, had stated as follows:

> Applying the aforesaid principles to the present case, as a consequence of the payment stay order dated 8 August 2008 the whole effect of the winding up ceases and the plaintiff company can thereon carry on its business activities and operations as if no winding up order existed. How does this affect the impugned events? It is this — a stay order only becomes operative from the date of the stay order. In other words, a stay order has no retrospective effect. It only takes effect from the date it was made. Accordingly, the effect of the permanent stay order is this — from 8 August 2008 onwards the plaintiff's company may carry on its business and operations 'as if no winding up order existed'. It does not mean that the winding up order never existed or that the winding-up order has been set aside or revoked. The winding up order is still in existence. It only became inoperative from 8 August 2008 onwards. In short, the permanent stay order relates only to events which were transacted by the plaintiff company from 8 August 2008 onwards. It does not relate back to events which took place prior to 8 August 2008.

The Federal Court in *Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid* [1979] 2 MLJ 244 cautioned against too readily invalidating contracts when dealing with statutes regulating commercial transactions. Raja Azlan Shah CJ (as HRH he then was) had this to say:

> We bear in mind the much quoted and commonsense warning by Devlin J in *St John Shipping Corporation v Joseph Rank Ltd* against a too-ready assumption of illegality or invalidity of contacts when dealing with statues regulating commercial transactions.

[16] Learned counsel for the appellant complains that the learned judge erred in law when he only dealt with the stay order granted on 8 August 2008 which is not relevant to the facts of the case and failed to consider and give effect to the stay order granted on 17 May 2006 which was operative during the presentation and registration of the transfer of the said land, in favour of the appellant.

[17] Learned counsel for the appellant also says:

(a) two weeks after the winding up order was made, the Department of Insolvency had given its written sanction and consent to continue and complete the sale of the land;

(b) when the stay was granted on 17 May 2006 the official receiver was present and did not oppose the application;

(c) the new board of directors' cannot renege or resile of a bona fide transaction of the company;

(d) the company and/or board of directors cannot rely on its own breach or take advantage of its own wrong doing (see *New Zealand Shipping Company Limited v Societes Des Ateliers Et Chantiers De France* [1919] AC

1; *Alghussein Establishment v Eton College* [1991] 1 All ER 267; *Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd* [1999] 3 MLJ 489; [1999] 3 CLJ 577);

(e) the first stay order which lapsed on 20 September 2007 upon the Court of Appeal dismissing the respondent's appeal against the winding up order cannot invalidate transactions which were done during the time the first stay was in force. It only meant that the stay has no further effect and force from the date of its lapse;

(f) it was plainly wrong for the learned judge to have ruled that since the stay order was set aside on 20 September 2007. There was effectively no stay order and in consequence the events that took place after the stay order are rendered null and void;

(g) the learned judge erred in completely ignoring or failing to address the temporary stay order dated 17 May 2006 which remained in effect till 20 September 2007. The learned judge only addressed it to the effect of the permanent stay from 8 August 2008 onwards. In fact the transfer of the said land to the appellant was completed during the lifespan of the temporary stay between 17 May 2006 and 20 September 2007. Nothing relevant or material to the transaction happened after 20 September 2007. This is clearly borne within the chronology set out with by the learned judge on the grounds of judgment; and

(h) plainly wrong for the learned judge to hold the impugned events relating to the sale as illegal and void for breach of s 223.

[18] It is also pertinent to note the appellant's submission which reads as follows:

> The Respondent's submissions that the approval of the Court was not obtained is not only contrary to the facts but misleading. In making the application for a stay supported by the affidavit of the Respondent's authorized representative stating all the relevant facts pertaining to the sale and exhibiting the SPA the Respondent themselves moved the Court for the approval/sanction of the Court of the SPA and the transfer of the said Land to the Appellant. The Stay Order had the effect of and enabled the respondent to carry out and continue with its business as if there was no Winding-Up Order. The contributories wanted it and the Petitioning Creditor's interest was also secured by the full payment of the judgment sum into Court, which was from the first 30% the Appellant paid towards part payment of the purchase price of the said Land. The Court recognized and accepted that the sale of the said Land to the Appellant was for the benefit of the Respondent and its creditors.
>
> These documents are the Respondent's own court documents which the Respondent was duty-bound to have disclosed. By only disclosing the Stay Order and suppressing the affidavit in support the trial Court was led to believe that there was no validation and sanction under s 223 of Companies Act 1965 for the sale and transfer of the Land to the Appellant. This was the principal issue for determination.

The Respondent's non-disclosure of these documents is a grave and serious omission that impairs the administration of justice which is punishable with contempt. [See *Cheah Cheng Hoc v Public Prosecutor* [1986] 1 MLJ 299].

> (i) It is clear that the learned judge was misled on an important matter that is the concealment of a document so as to effect the credibility of the witness even though it did not directly relate to the issue in the action.
>
> It is very important for a counsel to remember that whatever may be his duty to his client his duty to the court remains paramount in the administration of justice. (p 301) per Lee Hun Hoe CJ.

The Respondent's callous submissions that the Court did not authorize the sale flies in the face of the Respondent's own conduct in filing the stay application and its sworn supporting affidavit file in a court of law and is a gross misrepresentation of the true facts.

Clearly the Respondent is stopped from challenging the validity of the sale and the authenticity of the Official Receiver's letter of consent which the Respondent procured, delivered to the appellant to induce the Appellant to pay the balance of the purchase price.

The stay application and affidavit in support are crucial and material documents in the Respondent's possession which ought to have been disclosed at the trial. Instead they were suppressed. The Respondent only disclosed the Stay Order but not the application and affidavit in support thereof.

These are Court documents which show that the High Court addressed its mind to the SPA between the Appellant and Respondent and validated and sanctioned the sale and transfer. The Stay Order refers to the Respondent's Affidavit dated 2 May 2006. The Honourable Court can take judicial notice of these documents.

(i) These documents are the Respondent's court documents/sworn by the Respondent - thereof no surprise or prejudice.

(ii) S 57 Evidence Act 1950;

(iii) 'Judicial notice can be taken of matters relating to pending or past legal proceedings. This is because a legal proceeding is a matter of public knowledge.' Per Augustine Paul p 531, *Evidence Practice and Procedure* (3rd ed.) by Augustine Paul.

(iv)
- (a) 'Judicial notice takes the place of proof and is of equal force. As a means of establishing facts it is therefore superior to evidence.' P 888, *Sarkar's Law of Evidence* Vol. 1.
- (b) 'The court is entitled to look at its own records and proceedings in any matter and take notice of their contents although they may not be formally brought before the court by the parties.' P 888, *Sarkar's Law of Evidence* Vol. 1.
- (c) 'Taking judicial notice means that the court is itself duty-bound to hunt up the fact and apply it even though the parties or their counsel fail to product it.' p 905, *Sarkar's Law of Evidence* Vol. 1.

(d) 'Matters of judicial record are unquestion-able.' p 1525, *Sarkar's Law of Evidence* Vol. 2.

It is therefore respectfully submitted that the sale was not void but approved sanctioned and validated by the Court under s 223 of the Companies Act 1965.

Further and in any event upon the granting of the Winding-Up Order, the Official Receiver steps into the shoes of the Board of Directors and is empowered under section 236 of the Companies Act 1965 to carry out the activities of the Respondent.

Had there been no stay the OR having consented to the SPA would, as the duly authorized representative of the Respondent, in place of the directors, have executed the MOT and transferred the said Land to the Appellant.

However, as there was a stay and the control and management of the Respondent reverted to the Board of Directors, the directors of the Respondent executed the MOT.

Therefore, it is respectfully submitted that the sale and transfer of the said Land was effected with the requisite approvals of all the relevant parties.

It is not proper for the new Board of Directors of the Respondent to come to Court and apply to set aside the transfer relying on their own alleged wrongdoings, i.e. procuring a forged letter of consent from the Insolvency Department and failing to pass the necessary corporate resolutions (internal matters within their control).

[19] Learned counsel for the respondent says that transfer is void. We must say here that the issue as to whether it is void or not can only be determined by the court. It may be void but it cannot attract the jurisprudence relating to illegality and the concept of nullity ab initio. Section 223 is there to protect creditor, contributories and the relevant parties and if the board of directors after the commencement of the winding up proceeding act in contrary to the law such transaction may be invalidated. And that section gives notice to third parties who intend and/or are dealing with the company to restrain from having any transaction's relating to disposal once the winding up proceedings has commenced.

[20] We have read the appeal record, and the submission of the parties in detail. The court is grateful to the comprehensive submission. We do not wish to repeat the same save to deal with the core issues. After having given much consideration to the submission of learned counsel for the respondent, we take the view that the appeal must be allowed. Our reasons, inter alia, are as follows:

(a) it is well settled that any disposal of property after the commencement of the proceeding can be validated by the court before or after the winding up order. It is also well settled that an order for validation under s 223 of the CA 1965 will ordinarily be given if the transaction was made reasonably and in good faith for the benefit of the company or made

honestly and in the ordinary course of business. Support for the proposition is found in a number of cases. To name a few are as follows: (i) *Re Clifton Place Garage Ltd* [1969] 3 All ER 892; (ii) *Re Steane's (Bournemouth) Ltd* [1950] 1 All ER 21; (iii) *Tradebond (M) Sdn Bhd v Halim-O Construction Sdn Bhd* [2005] 7 MLJ 624; [2005] 7 CLJ 93; (iv) *Jardio Holdings PTY Ltd v Dorcon Construction PTY Ltd* [1984] 3 FCR 311.

The learned author of *Palmer's Company Law* (21st Ed) at p 770 had this to say:

> A disposition of the property of the company, including things in action and a transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding up, is void unless the court otherwise orders (s 227); but the practice of the court is to allow such payments or dispositions, pending the petition, if made honestly and in the ordinary course of business. [*Re Oriental Bank Corporation* [1884] 28 Ch D 634; *Gorringe v Irwell India Rubber Works* [1886] 34 Ch D 128].
>
> The court has jurisdiction under section 227 to authorize a disposition of the company's property for the benefit of creditors, notwithstanding that a winding-up order has not yet been made. [*Re A I Levy (Holdings) Ltd.* [1964] Ch 19; see also *Garden v Albert Palace Assocn.* [1886] 56 L J Ch 166; *Re Douglas (Griggs) Engineering Ltd.* [1963] Ch 19; *cf Re Miles Aircraft Ltd.* [1948] Ch 188].

(b) take for instance in this case if the appellant had made an application for validation (which we think for reasons stated below is not necessary) in all likelihood it will be given as it was the finding of the court that the transaction in essence was bona fide. Even if the appellant by way of counterclaim has sought an order for validation in all likelihood it will be given, as a declaratory order is only a discretionary relief and based on the jurisprudence relating to discretion under the Specific Relief Act 1950, the court on the factual matrix case ought not to have granted the order in favour of the respondent, more so when the transaction was bona fide and the title has been perfected (see *Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee)* (1998) 4 MLJ 651; (1998) 4 CLJ 812). There is no requirement under s 223 of the CA 1965 for an application for validation to be made separately. The court can decide the issue at any time or during any relevant legal proceedings;

(c) from the reading of s 223 it is clear that the status of the disposal can only be determined by the court. In practical terms even though the Act says it is void it is not void ab initio or nullity or illegal per se. The commercial reality is that there may be a number of transactions which would have escaped the court's scrutiny during the twilight period of commencement and winding up which if challenged in court may be declared void. If not challenged it may pass as an ordinary transaction of the company. In

consequence to say such a transaction is a nullity and cannot be cured as argued by the learned counsel for the respondent and accepted by learned judge in our view is flawed. More so when the learned judge has found that the transaction in essence was bona fide and title has been perfected. The relevant part of the judgment on this issue, inter alia, reads as follows:

> By reason of the foregoing, the court holds that the permanent stay order does not relate to the impugned events which transpired before 8 August 2008. Consequently, the impugned events are illegal, null and void for being made after the commencement of the winding up by the court under s 233 of the Act. It must therefore follow that the SPA and transfer of the land to the first defendant is void as it was effected during the period after the presentation of the winding up petition and after the winding up order has been made.

On the factual matrix of the case there was no obligation on the court to grant the declaratory relief which is purely discretionary (see *Alliance Bank Malaysia Bhd v W Shalihudin bin W Ibrahim and another suit* [2012] 10 MLJ 374; *Central Securities*);

(d) s 243 of the CA 1965 gives jurisdiction to stay the proceedings and if necessary *on terms* (Emphasis added.) Stay is not ordinarily granted as it has the effect of reviving the wound up company to proceed from the date the stay was granted and the company can thereafter resume the conduct of its business and affairs as if no winding up order existed (see *Krextile Holdings Pty Ltd v Widdows Re Brush Fabrics Proprietary Limited* [1974] VR 689). In almost all cases the court will be reluctant to order a stay unless the justice of the case requires to do so and the strict requirements set out in the winding up rules have been satisfactorily complied with, very importantly to protect the creditors and other relevant parties. In *Tiong Hung Ming v Kalimantan Hardwood Sdn Bhd; Weeluk Holding Sdn Bhd (Applicants)* [2008] MLJU 381; [2008] 9 CLJ 593, Hamid Sultan bin Abu Backer JC (as he then was) on s 243 had this to say:

> Law on stay of winding up
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> The learned author KV Padumanabha Ram in his book *Winding Up of Companies* — has put much thought into this area of law. It can be summarised as follows:
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> (a) the CA 1965 or the Companies (Winding-up) Rules 1972 (CR 1972), contains no provision for setting aside or for rescinding a winding up order made by the High Court and the judicial view on the question of having the power, inherent or otherwise, to do so is also not uniform. The foreign precedents also show conflicting views on this point, (see *Brindon New Zealand Ltd v Tent World Ltd* [1992]

3 NZLR 725, *South African Syndicate Ltd* [1883] 28 SJ 152, *Blatt Ray Inc* (1939) 20 CBR 447, *Samoana Press Co Ltd.* (1987) 4 NZCLC 64).

(b) s 243 of the Act empowers the court to stay the winding up proceedings. That discretionary power can be exercised at any time after an order for winding up has been made, on an application of: (i) the liquidator; (ii) any creditor; or (iii) contributory. On proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed, the court may make an order staying the winding up proceedings either altogether or for a limited time on such terms and conditions as the court thinks fit. Before making any such order on an application for stay, the court may require the liquidator to furnish a report with respect to any facts or matters which in his opinion are relevant. The report of the liquidator, when it is called for by the court, should reflect the fact that he has carried out a proper investigation into the affairs of the company and must make references to the company's book or audited accounts or make consultations with the principal officers of the company such as the auditor and the secretary. This he has to do before coming to a conclusion that the company is solvent. The liquidator is duty bound to place before the court all the relevant facts without any tinge of partiality. The report should also refer to the 'ugly side' of the company's affairs if any and also refer to the adverse effect of the stay on the person seeking it. An office copy of every order made under s 243 is to be lodged by the company with the registrar and also the official receiver within fourteen days after the making of the order and any failure to comply by the liquidator or had obtained judgment against the company in the civil suit, otherwise, it would remain a person 'claiming to be a creditor'.

(c) the normal practice which the courts have been following is not to grant a stay of the winding up proceedings immediately after a winding up order is made, (see *A&BC Chewing Gum* [1975] 1 WLR 579).

In *Vijayalakshmi Devi Nadchatiram v Dr Mahadevan Nadchatiram & Ors*, the Federal Court observed:

In summary, the principles which emerge from the above authorities are these:

(1) The granting of a stay under s 243 of the Act is discretionary and the onus is on the party seeking a stay to make out a positive or sufficient case.

(2) The attitude of the creditors, contributories and the liquidator is a relevant consideration.

(3) That in exercising its discretion, the court will consider not only the interest of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large.

(4) Last, and which by no means least, is that a stay will be refused if there is evidence of misfeasance or of irregularities demanding investigation.

(e) it is well settled that the order for stay does not have retrospective effect and it is clear that it has only prospective effect. Because it does not have retrospective effect the court when granting the stay is obliged to consider the events from the date the winding up petition was filed until the date of stay inclusive of any issues which have to be dealt with under s 223 of the CA 1965. And if stay is granted it can be on terms. The parties to the stay application must be vigilant to obtain the relevant terms. For example, (i) in the instant case where the first stay was obtained pending appeal, a term could have been incorporated in the order that the company be restrained from disposing of its landed property; (ii) to validate any of its transactions from the date of commencement of winding up proceedings until the interlocutory or final stay is granted. We will go to the extent of saying when court is minded to grant the stay it will be prudent to ensure that the past acts of the company after the commencement of the winding up has been regularised to ensure no disputes as the instant case will arise;

(f) in the instant case we do not think a validation order is necessary as the transfer of the property was validly done when the first stay dated 17 May 2006 was effective. In fact attempt to sell the property had commenced as early as 5 May 2005. The memorandum of transfer and the transfer was registered during the period of the first stay and in consequence the provision of s 223 will not become operative at all. The chronology of the events have been well articulated in the judgment and learned counsel for the appellant has summarised it as follows:

• 5 May 2005	Letter of offer by the respondent's agent to appellant offering land for sale.
• 29 June 2005	The appellant offer to purchase land at RM17,000 pa.
• 8 July 2005	The respondent offers to sell land to the appellant at RM17,000 pa ie total purchase price of RM12,087,000.
• 12 July 2005	The appellant accepts the respondents offer.
• 13 July 2005	The appellant solicitors forward cheque for 5% of purchase price to the respondent's solicitors.
• 8 Aug 2005	The respondent's solicitors forward four copies of SPA to the appellant's solicitors for execution.
• 12 Aug 2005	The appellant's solicitors return four copies duly executed for SPA together with cheque for 25% of purchase price.
• 14 Oct 2005	The respondent's solicitors return to the appellant's solicitors four sets of SPA duly executed.
• 4 Jan 2006	Winding up petition presented.

• 21 March 2006	The respondent's solicitors request for replacement cheques for 30% of purchase price as earlier cheques had expired.
• 22 March 2006	The appellant's solicitors forward to the respondent's solicitors two replacement cheques for 30% of purchase price in the respondent's name.
• 28 March 2006	The respondent's request for the two replacement cheques be replaced again in favour of their solicitors.
• 3 April 2006	The appellant's solicitors tender replacement cheques.
• 12 April 2006	SPA dated. The respondent changes solicitors from M/s Bahari & Bahari to M/s Abdul Halim Zairus ('ALTZ') and direct payments to be made to ALTZ.
• 13 April 2006	Winding up order against respondent's announcement to Bursa Malaysia that SPA executed on 12 April 2006.
• 21 April 2006	The appellant's solicitors wrote to the respondent's solicitors enquiring about winding up order and for confirmation of liquidator/official receiver's sanction or consent to continue with the sale.
• 25 April 2006	The respondent's solicitors wrote to Department of Insolvency seeking their consent/sanction to continue and complete the sale.
• 28 April 2006	Letter from Department of Insolvency to the respondent's solicitors giving sanction and consenting to continue and complete the sale and purchase agreement.
• 8 May 2006	Letter for the respondent's solicitors forwarding Department of Insolvency's letter dated 28 April 2006 and asking for payment of RM3,626,100 into their client's account.
• 17 May 2006	Order of High Court granting a stay of the winding up order until the disposal of the appeal by the Court of Appeal against the winding up order. The official receiver attended and did not oppose the application. There was no appeal against this order.
• 29 May 2006	MOT executed by the respondent in favour of the appellant.
• 5 June 2006	Director of lands and mines writes to the respondent enclosing Johor Estate Land Board's approval for sale under s 214(A) of the National Land Code.
• 27 June 2006	Transfer registered in favour of the appellant.
• 10 July 2006	The appellant remits balance purchase price to the respondent's solicitors.
• 23 May 2007	Appointment of new board of directors of the respondent.
• 20 Sept 2007	The respondent's appeal to Court of Appeal of winding up order dismissed. Stay order set aside.
• 8 Aug 2008	High Court grants a permanent stay of the winding up order.

(g) we have perused the judgment in detail and we note that learned judge had omitted to deal with the first stay order and in consequence the integrity of the decision making process has been compromised on this

A issue and we agree with learned counsel for the appellant that appellate intervention is necessary. Save for this issue we must say the judgment was sound in all aspect.

B **[21]** For reasons stated above the appeal is allowed with costs. The order of the learned judge against the appellant is set aside and the order of the learned judge favouring the appellant's counterclaim is also set aside. The respondent to pay the appellant costs of RM50,000 here and below.

C **[22]** We hereby order so.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor

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